IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-5595

JAMES ADAMS,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court
For the Southern District of Florida

REPLY BRIEF FOR PETITIONER-APPELLANT

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STATEMENT OF THE ISSUES

1. Whether Petitioner was deprived of the reasonably effective assistance of counsel at his capital sentencing hearing, thus requiring the setting aside of his death sentence.

2. Whether Petitioner's death sentence is grossly disproportionate, excessive, and the product of unreliable proceedings, since it was imposed for a non-premeditated homicide committed during the commission of a felony, which was indistinguishable from any other felony murder.

3. Whether Petitioner's death sentence is the product of unreliable proceedings, since it was imposed pursuant, in part, to the jury's and trial judge's consideration of legally improper aggravating circumstances.

4. Whether Petitioner and other capital defendants in Florida have been deprived of critical Eighth and Fourteenth Amendment rights by the Florida Supreme Court's harmless error rule concerning the sentencer's consideration of and reliance upon legally improper aggravating circumstances.

5. Whether Petitioner was deprived of his right to an individualized sentence determination by the trial court's exclusion of evidence of non-statutory mitigating circumstances and instructions to the jury precluding the consideration of non-statutory mitigating circumstances.

6. Whether Petitioner's constitutional rights were violated by the Florida Supreme Court's ex parte consideration of extra-record psychiatric, psychological, and correctional reports in his and others' pending capital appeals.

7. Whether Petitioner was deprived of equal protection and due process by the resolution of his claim concerning the arbitrary application of the death penalty without first providing the expert assistance necessary for the full and fair consideration of this claim.

ARGUMENT

I. PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL PROSECUTION.

The State magnanimously concedes that it "does not materially disagree" with the well-established standards for assessing the ineffective assistance of counsel as set forth in Mr. Adams' opening brief, but then adds a novel test, announced in Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), that a defendant must show that knowledge of any uninvestigated evidence would have altered defense counsel's strategy in order to prevail on a claim that counsel's failure to ivestigate prevented him from making informed tactical choices. R.Br. 11.[1] But this test is, of course, not binding on this Court, since Gray was decided by the present Fifth Circuit Court of Appeals after creation of this Court for the Eleventh Circuit. Only those cases decided by the Fifth Circuit prior to the split in the Court are treated as controlling precedent of this Court. Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981).

Even more fundamentally, however, the rule stated in Gray is not one with any firmly rooted antecedent in the law, but rather amounts to an aberration, inconsistent with precedent and policies in Sixth Amendment jurisprudence. In particular, Gray's apparent conclusion that a decision as to strategy can precede and even limit counsel's responsibility to conduct an independent and thorough

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[1] References to the briefs submitted by the parties herein will be designated as follows:

"Pet. Br."	Petitioner's initial brief
"R. Br."	Respondent's answer brief

pre-trial investigation flies in the face of legal principles firmly established in, e.g., Gaines v. Hopper, 575 F.2d 1147, 1149-1150 (5th Cir. 1978); Washington v. Strickland, 673 F.2d 879, 892 (5th Cir. 1982), reh. en banc granted __ F.2d __ (1982); Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Davis v. Alabama , 596 F.2d 1214, 1220-1221 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). As these cases recognize, just as "a purported trial without adequate preparation amounts to no trial at all," Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967), so a purported strategy without adequate investigation of the necessary facts to support a strategic choice amounts to no strategy at all. Indeed, the above cases reflect a long-standing skepticism that truly competent counsel could ever reach an informed decision without gathering the facts required to tell the attorney how best to pursue the obligations of an advocate.

In addition, Gray's test of prejudice, supra , 677 F.2d at 1093, substitutes a subjective standard of inquiry into counsel's thought process for the objective test which has prevailed in this Circuit since Davis v. Alabama, supra, which requires an examination of the specific and concrete evidence that an investigation would have uncovered and a determination of whether that evidence would have been helpful to the defense. The Gray standard, on the other hand, would direct the federal courts into the murky and speculative area of counsel's mental processes: "the court would have to put itself in the place of an attorney who was better informed by a client who was better advised, and decide what differnt decisions that attorney would have made. This will often be a hopelessly intrictate task." Davis v. Alabama, supra, 596 F.2d at 1223, see also Washington v. Strickland, supra,

at 901-902.

Enunciating a standard both more capable of consistent administration and more in accordance with the line of cases cited, supra, is the decision of the Third Circuit Court of Appeals in United States v. Baynes, 687 F.2d 659 (3d Cir. 1982). In that case, defense counsel failed to refer to or make use of a voice exemplar, although the only evidence of his client's guilt was a twelve-word recorded telephone conversation in which he allegedly participated. The appellate court noted,

> "In this case, an avenue that conceivably might have led to the exoneration of the defendant was not explored by trial counsel; no attempt was made to compare the voice exemplar with the intercepted tape. To be sure, had such a comparison been made, [the defendant's] attorney might well have decided as a matter of trial strategy not to refer to the voice exemplar at trial. ...Such a decision on the part of trial counsel properly could have been made, however, only after a careful and comprehensive comparison of the two recordings had been conducted." Id. at 666 (emphasis original.)

Thus whether or not an attorney has appropriately made tactical trial decisions will not even be addressed until it has first been established that he had the necessary information to make such a decision as a result of his adequate investigation of the case.

Baynes is also instructive with respect to the State's main argument that Mr. Adams did not, at the State post-conviction hearing below, present sufficient competent evidence to support his claims of ineffective assistance. R.Br. 13, 18, 20. The Baynes court observed, regarding the focus of proof in such cases that

> "To prevail on this appeal, [the defendant] need not prove that it was not his voice on the intercepted recording; instead he need only show that his trial attorney's 'exploration of the voice exemplar issue might have led to a viable defense and a verdict favorable to [him]' [Citations omitted]." Id. at 671. (emphasis original)

In the present case, it was not and could not have been Mr. Adams' obligation, at the post-conviction hearing, to litigate anew, as if in a penalty phase hearing, the approrpiateness or inappropriateness of the death sentence imposed against him. That was simply not the question before the trial judge at that time. Instead, the trial judge was being asked to determine whether defense counsel had adequately investigated the factual matters available to him so that he could make an informed decision as to how to proceed at the sentencing phase. Viewed in this light, there can be no question that Mr. Wilkinson, Mr. Adams' support counsel, was entirely competent to testify as to the facts within his own direct knowledge: that is, what investigation, if any, was actually performed by lead counsel, Mr. Schopp, and what information Mr. Wilkinson was readily able to discover in his own investigation made after trial and sentencing. Mr. Wilkinson testified fully regarding the results of his own exploration of the mitigation in the present case, and, to say the least, they were not fruitless. Thus, Mr. Adams successfully showed that information existed which could and should have been investigated prior to Mr. Adams' sentencing, since there is no question that it was relevant thereto,[2] but that no such investigation was undertaken. He, therefore, met his burden of showing that trial counsel did not render "reasonably effective assistance of counsel."

Similarly unfounded is the State's attempt to explain the rousing closing argument by Mr. Schopp as being "aimed at having the

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[2]Even less merit can attach to the State's contention that the failure to investigate Mr. Adams' prior uncounselled convictions was harmless, since such convictions can be considered at sentencing. R.Br. 19. Such a contention has been specifically rejected in Florida, Lloyd v. State, 346 So.2d 1075(Fla. 2d DCA 1977); Glenn v. State, 338 So.2d 263 (Fla. 2d DCA 1976); Hicks v. State, 336 So.2d 1244 (Fla. 4th DCA 1976), which controls the evidentiary parameters of the sentencing proceeding in the instant case.

jury view the death penalty as an uncivilized ultimate act which should not be tolerated against other human beings." R.Br. 15. Not only does this characterization ignore that portion of defense counsel's argument wherein he conceded that "the Florida legislature has declared in its infinite wisdom that the death penalty is a proper judgment in some cases." (T 1179)[3] It also ignores that this jury had been death qualified: each juror sitting on this case had affirmed that he could recommend a death sentence, thus rendering defense counsel's "argument", as the State interprets it, rejected before it was made.

The State's creative manipulation of the record to support its argument in this appeal does not end here, however. The State further relies for affirmance of the district court's order below on the fact that lead trial counsel, Mr. Schopp, did not himself testify. R.Br. 12, 20. In addressing this position, it is important to focus on the actual legal issue before the trial court at the time of the hearing on Mr. Adams' motion for post-conviction relief. By urging that Mr. Adams was fatally remiss in not calling this witness to testify, the State completely ignores the essentially antagonistic relationship now existing between Mr. Adams and his erstwhile counsel. Mr. Adams is, after all, alleging that his trial attorney did not perform the duties required of him. The natural response of counsel against whom such a charge is made will very likely be to seek to justify—even where no justification is legally possible—his actions and thus try to protect his professional standing. It is because of

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[3]References to the record will be pursuant to the same abbreviations set forth in Mr. Adams' opening brief at footnote 1.

this inherent conflict that counsel other than Mr. Adams' trial counsel was appointed to represent Mr. Adams in the post-conviction proceeding. Adams v. State, 380 So.2d 421 (Fla. 1980). And it is because of the adverse relationship created by the allegation of ineffective assistance that it is ordinarily the State, and not the defendant, who calls trial counsel to defend himself, once the defendant has proven through competent evidence that trial counsel was, in fact, derelict, as in the instant case. This was never, of course, done in the present case, so that the State's suggestion that, "Perhaps no proof was adduced because there is no such proof," R.Br. 20, tells more strongly not against Mr. Adams' position, but against its own suggestion, unsupported by anything other than sheer speculation and an unacceptably strained reading of the record, that trial counsel made a "tactical decision" to give up at the penalty phase.

In short, there is not, as the State appears to believe, any presumption that a trial attorney's deficiencies are always the result of strategic considerations, rather than ignorance. Instead, that a legitimate basis for counsel's action and/or inaction exists is a matter which it is incumbent upon the State to show. Conversely, it cannot conceivably be the duty of a defendant to call a witness in order to elicit adverse and self-serving statements which the defendant disputes but is precluded from testing through cross-examination. Our adversary system of justice simply does not allow for such a Catch 22 situation. Consequently, Mr. Adams has established the ineffectiveness of the representation afforded him by trial counsel, and the State has totally failed to rebut this showing in any way, either below or before this Court.

II. EXECUTION OF THE DEATH SENTENCE IMPOSED AGAINST MR. ADAMS IS GROSSLY DISPROPORTIONATE, EXCESSIVE, AND STANDARDLESS WHERE THE KILLING WAS NOT DELIBERATE BUT COMMITTED DURING A FELONY, AND WHERE AN AGGRAVATING CIRCUMSTANCE WAS APPLIED WHICH FAILS TO DIFFERENTIATE THIS CASE FROM ANY OTHER FELONY-MURDER.

The State contends in response to Mr. Adams' complaint herein, that Wainwright v. Sykes, 433 U.S. 72 (1977) precludes this Court's review of the issue. R.Br. 24. This contention is without merit: the impropriety of Mr. Adams' death sentence for an untentional killing during the course of a felony was specifically raised in the Second Supplemental Brief filed in his behalf on direct appeal to the Florida Supreme Court. The State chose not to respond to that issue then, and it certainly never argued that the issue was waived until this case arrived at the federal district court. Moreover, the Florida Supreme Court rejected this issue on its merits by its opinion affirming Mr. Adams' conviction and death sentence.

The instant case therefore falls within the parmeters of Henry v. Wainwright, 686 F.2d 311 (5th Cir. 1982) (Unit B) (on remand). In that case, this Court considered, pursuant to the Supreme Court's remand, whether a sentencing issue in a death penalty case had been waived in the Florida state courts, thus precluding federal review. Henry concluded that the issue was not waived, even if the defendant's objection below was inadequate, strictly speaking, to preserve the issue. this holding was in turn based on a finding that the Florida appellate court considered the issue on the merits, ignoring any procedural

default which might have existed. And,

> "If Florida dealt with the merits of Henry's objection, whether or not there was a procedural default at trial under state law, then a federal habeas corpus court must also determine the merits of the claim. [Citations omitted.]" Id. at 313.

In Henry, as in the present case, the issue involved had been argued on direct appeal to the Florida Supreme Court. In Henry, as in the present case, that Court did not expressly discuss its rationale for rejecting the issue on appeal.[4]

Yet this Court noted and relied on the State court's avowed policy of exercising an especially broad scope of review in death cases, as expressed in Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977). Precisely the same considerations, then, attach to both the instant case and Henry v. Wainwright, supra, and the State's reliance on Wainwright v. Sykes, supra, is misplaced.

Also patently erroneous is the State's argument that no federal issue is raised by the instant challenge. The effect of the Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976) on future attacks on the application of an aggravating factor under Florida's capital sentencing scheme was

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[4] In the present case, the Florida Supreme Court addressed only the "principal issue for determination," which related to jury instructions during the guilt phase of the trial, Adams v. State, 341 So.2d 765, 766 (Fla. 1977), and it additionally affirmed the death sentence after stating, "our final responsibility is to consider the appropriateness of the death sentence in order to determine independently whether the death penalty is warranted." Id. at 769. In Henry, the Supreme Court likewise generally concluded that "no reversible error is made to appear..." See, Henry v. Wainwright, supra, at 313.

discussed in Proffitt v. Wainwright, 685 F.2d 1227, 1261-1262 at fn. 52 (11th Cir. 1982). This Court noted that the United States Supreme Court in Godfrey v. Georgia, 446 U.S. 420, 422, 433-432 (1980) had itself, in a plurality opinion, joined in this respect by two concurring Justices, addressed just such a contention on federal constitutional grounds.[5] This Court consequently concluded, rightly, "that the language in the Spinkellink [v. Wainwright, 578 F2d 582 (5th Cir. 1978)] opinion precluding federal courts from reviewing state courts' application of capital sentencing criteria is no longer sound precedent." Proffitt v. Wainwright, supra. The State's attempt at avoidance sub judice must therefore fail.

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[5] See also Zant v. Stephens, ___ U.S. ___, 102 S Ct. 1855, 1857 72 L.Ed.2d 222, 225-226 (1982); "In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976), we upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate to a significant degree the concern of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346 (1972), that the death penalty not be imposed capriciously or in a freakish manner. We recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing capital sentences consistently with this concern. See 428 U.S. at 198, 201-206, 96 S.Ct. at 2937, 2938-2940 (Opinion of Stewart, Powell, and Stevens, JJ.); id at 211-212- 222-224, 96 S.Ct. at 2943, 2947 2949 (White, J., concurring in judgment). Our review of the statute did not lead us to examine all of its nuances. It was only after the state law relating to capital sentencing was clarified in concrete cases that we confronted and addressed more specific constitutional challenges in Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977); Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); and Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)."

III. THE AGGRAVATING CIRCUMSTANCES CONSIDERED BY THE JURY AND JUDGE FAILED TO CHANNEL THEIR SENTENCING DISCRETION AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS.

In his opening brief Mr. Adams argued that the sentencers' consideration of the "heinous, atrocious, or cruel" statutory aggravating circumstance, which was unsupported by the evidence, and of two non-statutory aggravating circumstances, unchanneled sentencing discretion in violation of the Eighth Amendment. The state has responded that the evidence was sufficient to support a finding of the heinous, atrocious, or cruel circumstance, and that one of the non-statutory circumstances was considered on rebuttal of a mitigating circumstance rather than in aggravation. The first response miscontrues the record. The second misconstrues the trial judge's findings of fact in support of the death sentence.

The state has argued (R. Br. 28) that the evidence was sufficient to support a finding that the murder was especially heinous, atrocious, or cruel. The heart of the argument is that the "victim did not die quick, he suffered much. It was indeed brutal." (Ibid.) Suffering, consciousness of pain, and awareness of numerous physical assaults prior to death are critical elements in support of this aggravating circumstance. Simmons v. State, 419 So.2d 316, 319 (Fla. 1982); Breedlove v. State, 413 So.2d 1, 9 (Fla. 1982), cert.denied, ___U.S.____, (October 4, 1982); Scott v. State, 411 So.2d 866, 869 (Fla. 1982); Arango v. State, 411 So.2d 172, 175 (Fla. 1982), cert.denied, ___U.S.___, 102 S.Ct. 2973 (1982). However,

the record in this case does not demonstrate that the victim suffered, was conscious of pain or was aware of the various physical assaults against him.

To the contrary, the record conclusively shows that the victim was immediately rendered unconscious by the first blow to his head (T 797), and that he never regained consciousness thereafter (T 284, 297, 447, 778-780, 796-797). The prosecution even conceded this. (T, 244, 251) While the decedent did not die instantaneously, his consciousness of the acts done to him and of the pain associated with them nonetheless ended instantaneously. Thus, the manner in which decedent was killed was the manner in which the Florida Supreme Court has consistently held not to be heinous, atrocious, or cruel. Simmons v. State, supra; Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975) (cited in Mr. Adams' opening brief). Cf. Breedlove v. State, supra; Scott v. State, supra; Arango v. State, supra. Accordingly, the very violation of the Eighth Amendment found with respect to this aggravating circumtance in Proffitt v. Wainwright, 685 F.2d 1227, 1261-1265 (11th Cir. 1982), is also present here.

Equally unavailing is the state's argument that the trial judge's consideration of Mr. Adams' record of non-violent crimes was in rebuttal of a mitigating circumstance[6] rather than

[6] Section 921.141 (6) (a), Florida Statutes, provides for the consideration of the absence of a significant criminal history as a mitigating circumstance.

in aggravation. The judge's findings of fact in support of the death sentence belie such a strained interpretion.[7] In relevant part, the judge found the following:

> "... pursuant to the mandate of Florida statute 921.141 requiring that the determination of the court to impose a sentence of death be supported by specific written findings of fact based upon the records of the trial and the sentencing proceedings, it is hereby found and determined that aggravating circumstances, far outweighing any mitigating circumstances, are as follows:
>
> 1. The capital felony of murder in the first degree was committed by the defendant, James Adams while he was under a sentence of imprisonment for 99 years by the Court of General Sessions, Dyer County, Tennessee after a conviction on the charge of rape.
>
> 2. The defendant was previously convicted of a capital felony, same being the charge of rape above referred to and being a felony involving also the use or threat of violence to the person.
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> . . . .
>
> 6. The capital crime of murder in the first degree was especially heinous, atrocious and cruel.
>
> By his own admission the defendant was previously convicted of crimes on at least five occasions and the further undisputed evidence shows the defendant has a record involving crimes of violence; that he is an escapee of the State Prison System of the State of Tennessee and that the body of the victim was mutilated, mangled and disfigured unnecessarily."

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[7] That Mr. Adams' post-conviction hearing witness, on cross, may have agreed tentatively with the state's interpretation of the judge's findings is not binding upon Mr. Adams, since his legal conclusion is no more binding upon the Court than the Florida courts' legal conclusion.

(RD 84-85) (emphasis supplied). In the context of these findings, Mr. Adams' five previous convictions (without proof of any violence associated with them) were clearly seen by the judge as aggravating. His findings, as noted in his introductory remarks, discussed only the aggravating circumstances. The five previous convictions are mentioned in a paragraph apparently summarizing what the judge deemed the most aggravating of the just-enumerated factors. The convictions are mentioned in pari materia with Mr. Adams' "record involving crimes of violence." In this context, the judge unquestionably considered the prior crimes in aggravation, rather than in rebuttal of mitigation. Moreover, in the trial court, Mr. Adams never proffered the lack of a criminal history in mitigation. To suggest that this is nonetheless the context in which the trial court considered Mr. Adams' non-violent criminal record is to ignore the way in which the issues were tried and to urge this Court to violate the principles of Presnell v. Georgia, 439 U.S. 14 (1978). Such a plea should be rejected, and Mr. Adams' sentence should be vacated because it was imposed, in part, upon the consideration of the non-statutory aggravating circumstance of Mr. Adams' non-violent criminal record.

IV. THE FLORIDA SUPREME COURT'S HARMLESS ERROR RULE, CONCERNING THE SENTENCER'S RELIANCE UPON LEGALLY IMPROPER AGGRAVATING CIRCUMSTANCES, DEPRIVED PETITIONER AND DEPRIVES OTHER CAPITAL DEFENDANTS OF RIGHTS NECESSARY TO THE CONSTITUTIONAL IMPOSITION OF THE DEATH PENALTY.

With this issue, Mr. Adams has drawn into question only the following aspect of Florida's harmless (capital sentencing)

error rule: when there is error in the finding of some, but not all, of the aggravating circumstances, and there are no mitigating circumstances present, the error in the assessment of aggravating circumstance is necessarily (and always) harmless. The state's response confuses and muddles the straightforwardness of this issue. Mr. Adams is not arguing here that the Florida Supreme Court never finds the erroneous assessment of aggravating circumstances harmful, or never engages in a process of determining whether such error affected the critical weighing process in a capital sentencing proceeding. Nor is he arguing that the Florida Supreme Court should "automatically" reverse a death sentence upon a showing of the invalidity of just one of the aggravating circumstances. He is arguing only that the Florida Supreme Court mechanistically and "automatically" affirms death sentences which are based in part upon invalid aggravating circumstance when no mitigating circumstances are present, and that this process - which leaves no room for even an occasional reversal under such circumstances - violates the Eighth Amendment.

The state tries to hide this issue by arguing that Mr. Adams' argument proceeds on a faulty premise. (R. Br. 32-33) With this diversion in hand, the state thereafter never responds to Mr. Adams' three-part analysis of the unconstitutionality of the harmless error rule. The state's obfuscatory tactic is of no use, however, for Mr. Adams' premise is as solid as any premise can be: it is absolutely uncontradicted by the decisions of the Florida Supreme Court. Since the effective date of the current death penalty statute in Florida, no death sentence has been reversed under the circumstances presented by Mr. Adams'

case - in which some aggravating circumstances were erroneously considered but there were no mitigating circumstances found. See Cooper v. State, 336 So.2d 1133, 1140-1142 (Fla. 1976);[8] Adams v. State, 341 So.2d 765, 769 (Fla. 1977) [the case of the petitioner herein]; Aldridge v. State, 351 So.2d 942, 944 (Fla. 1977); Gibson v. State, 351 So.2d 948, 951-953 (Fla. 1977); Jackson v. State, 359 So.2d 1190, 1194-1195 (Fla. 1978); Washington v. State, 362 So.2d 658, 666 (Fla. 1978); Ford v. State, 374 So.2d 496, 503 (Fla. 1979); Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979); Clark v. State, 379 So.2d 97, 99, 104 (Fla. 1979); Shriner v. State, 386 So.2d 525, 534 (Fla. 1980); Johnson v. State, 393 So.2d 1069, 1072-1074 (Fla. 1980); Peek v. State, 395 So.2d 492, 497-500 (Fla. 1981); Demps v. State, 395 So.2d 501, 505-506 (Fla. 1981); Palmes v. State, 397 So.2d 648, 656-657 (Fla. 1981); Straight v. State, 397 So.2d 903, 909-910 (Fla. 1981). Armstrong v. State, 399 So.2d 953, 962-963 (Fla. 1981); Sireci v. State, 399 So.2d 964, 971 (Fla. 1981); Enmund v. State, 399 So.2d 1362, 1371-1373 (Fla. 1981), reversed on other grounds, ___U.S.___, 102 S.Ct. 3368 (1982); White v. State, 403 So.2d 331, 337-341 (Fla. 1981); Messer v. State, 403 So.2d 341, 348-349 (Fla. 1981); Tafero v. State, 403 So.2d 355, 362 (Fla. 1981); Francois v. State, 407 So.2d 885, 890-891 (Fla. 1982); Smith v. State, 407 So.2d 894, 903 (Fla. 1982); Raulerson v. State, ___So.2d___, 1982 F.L.W., S.C.O. 376, 378 (Fla., August 26, 1982); Bollender v.

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[8]For ease of reading, denials of certioarari have not been cited. Certiorari grants or subsequent modifications have been noted.

State, __ So.2d___, 1982 F.L.W., S.C.O. 490, 492 (Fla., October 28, 1982).[9] Thus it is axiomatic that the erroneous assessment of aggravating circumstances, in the absence of any mitigating circumstances, is deemed harmless. Conversely, it is also axiomatic that when the erroneous assessment of aggravating circumstances is deemed harmful, there are always mitigating circumstances which have been found to exist;[10] or is evidence of mitigating circumstances which should have been admitted, or if admitted, which should have been found to exist;[11] or is a jury recommendation of life imprisonment, which is tantamount to a finding of mitigating circumstances.[12]

Accordingly, Mr. Adams is not proceeding on a faulty premise. His premise -- that the Florida Supreme Court automatically affirms death sentences like his, which are based upon some

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[9] The only case deviating at all from this pattern is Maggard v. State, 399 So.2d 973 (Fla. 1981), in which two of three aggravating circumstances were invalid, and no mitigating circumstances were found. Id. at 977. While reaffirming the harmless error rule, the court reversed the death sentence, because evidence of the defendant's non-violent criminal record was admitted despite the defendant's waiver of any reliance on the mitigating circumstance (lack of significant record) which would have provided the only proper foundation for its admission. Ibid.

[10] Elledge v. State, 346 So.2d 998 (Fla. 1977); Riley v. State, 366 So.2d 19 (Fla. 1979); Mikenas v. State, 367 So.2d 606 (Fla. 1979); Menendez v. State, 368 So.2d 1279 (Fla. 1979); Miller v. State, 373 So.2d 882 (Fla. 1979); Fleming v. State, 374 So.2d 954 (Fla. 1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979); Lewis v. State, 377 So.2d 640 (Fla. 1980); Gafford v. State, 377 So.2d 333 (Fla. 1980); Mines v. State, 390 So.2d 332 (Fla. 1980); Blair v. State, 406 So.2d 1103 (Fla. 1981); Moody v. State, 418 So.2d 989 (Fla. 1982).

[11] Huckaby v. State, 343 So.2d 29 (Fla. 1977); Mines v. State, supra [note 10]; Perry v. State, 395 So.2d 170 (Fla. 1981); Jacobs v. State, 396 So.2d 713 (Fla. 1981); Ferguson v. State, 417 So.2d 631 (Fla. 1982); Ferguson v. State, 417 So.2d 639 (Fla. 1982).

[12] See, e.g., Tedder v. State, 322 So.2d 908 (Fla. 1975); Provence v. State, 337 So.2d 783 (Fla. 1976); Williams v. State, 386 So.2d 538 (Fla. 1980).

invalid aggravating circumstances offset by no mitigating circumstances -- is factually uncontradicted. This Court can now reach the merits of Mr. Adams' argument, which the state failed to reach in its brief, that such a practice violates the Eighth Amendment. See Pet. Br. 40-50.[13]

V. THE TRIAL COURT'S RULING CONCERNING THE SCOPE OF ADMISSIBLE MITIGATING EVIDENCE IMPERMISSIBLY RESTRICTED THE CONSIDERATION OF MITIGATING CIRCUMSTANCES.

In his opening brief, Mr. Adams argued that the trial judge issued an unrecorded pre-sentencing-hearing order restricting the presentation of mitigating circumstances to those contained in the statute. In response the state argued that the factual basis for this claim (the issuance of such an order) was too tenuous to support the claim and implied that this Court is bound by the Florida court's resolution of the claim. (R. Br. 37) Neither of these points has merit.

The factual basis of the claim is certainly established sufficiently -- given the error involved -- to require the Court to reach the merits of the claim. In Stephens v. Zant, 631 F.2d 397 (5th Cir.1980), modified, 648 F.2d 446 (5th Cir. 1981),

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[13] The vigor of the state's effort to avoid this issue cannot be gain said. While accusing Mr. Adams of proceeding on a faulty premise, the state itself proceeds on a faulty premise, asserting that the harmless error test is really "whether or not the Florida Supreme Court can be satisfied beyond a reasonable doubt that the results of the weighing process would have been no different." (P. Br. 36) If the court genuinely proceeded on this basis, then the court would most certainly have reversed some death sentences based upon faulty aggravating circumstances, even in the absence of mitigating circumstances. This Court has. See Henry v. Wainwright, (5th Cir. 1981), judgment reinstated, 686 F.2d 311 (5th Cir. 1982) (Unit B); Proffitt v. Wainwright, supra, 685 F.2d at 1268-1269. But the Florida Supreme Court never has. The only explanation for this is that the Florida Supreme Court applies the automatic harmless error test discussed by Mr. Adams, not the test put forward by the state.

cert. granted on other grounds, ___U.S.___, 102 S.Ct. 575 (1981), this Court considered a related issue: whether a death sentence can constitutionally be affirmed when the transcript before the reviewing court does not contain the proceedings of the entire trial. 631 F.2d at 402. Relying on Gardner v. Florida, 430 U.S. 349 (1977) and Gregg v. Georgia, 428 U.S. 153 (1976), the Court held that " [i]f the record presented to the Georgia Supreme Court was so deficient that it ... would create 'a substantial risk' that the penalty is being inflicted in an arbitrary and capricious manner, ... petitioner's sentence cannot be permitted to stand." 631 F.2d at 403. After articulating this principle, the Court outlined five considerations relevant to determining whether a particular claim arising from an omission in the record meets this test. 631 F.2d at 403-404. Mr. Adams' claim satisfies all five considerations.

First, the unrecorded order was a "key element" in the procedure by which the death penalty was imposed, 631 F.2d at 403, for it prevented the consideration of all the aspects of Mr. Adams' character and record and all the circumstances of the offense which might have been proffered in mitigation. See Lockett v. Ohio, 438 U.S. 586, 604-605 (1978); Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982). Second, the unrecorded order gave "the appearance of arbitrariness," ibid., because of its curtailment of the presentation and consideration of mitigating circumstances, supra. Third, there is affirmative proof of the nature of the untranscribed order, ibid., which

significantly curtailed Mr. Adams' Eighth Amendment rights.[14] Fourth, there was nothing contained elsewhere in the record, 631 F.2d at 404, to contradict the proof of the untranscribed order and its prejudice to Mr. Adams.[15] Finally, Mr. Adams has alleged substantial prejudice from this order because of its curtailment of the investigation and presentation of available non-statutory mitigating circumstances. Taken together, these considerations demonstrate that the unrecorded order created a substantial risk that Mr. Adams' death sentence was inflicted in an arbitrary and capricious manner, necessitating the setting aside of his sentence. Stephens v. Zant, supra.

The Florida Supreme Court's determination that the evidence of the unrecorded order was insufficient to require such a result, see Adams v. State, 380 So.2d 423, 424 (Fla. 1980), in no way binds this Court. The determination of the legal sufficiency of this evidence is a matter of federal law. Stephens v. Zant, supra. It is not a "factual determination" to which this Court must defer. Sumner v. Mata, 449 U.S. 539, 547 (1980).

Accordingly, because Mr. Adams has sufficiently established plain Lockett-Eddings error, his death sentence must be vacated.

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[14] The State's characterization of Mr. Wilkinson's recollection as "vague" is unfounded. Mr. Wilkinson testified that he expressly recalled Judge Sample's limitation on mitigating circumstances (PCT 14). (Apparently, such a limitation was not unique to the instant trial, leading to Mr. Wilkinson's sole uncertainty in the matter, which was dispelled after conferring with lead counsel, Mr. Schopp.) See Pet. Br. at page 53.

[15] It is an affront to the intellectual integrity of this Court to suggest, as the state does (R. Br. 38), that defense counsel's appeal to the jury on the basis of Mr. Adams' being "a human being" is sufficient evidence to show that this order did not curtail counsel's effort to present non-statutory mitigating circumstances.

VI. THE FLORIDA SUPREME COURT'S EX PARTE CONSIDERATION OF EXTRA-RECORD PSYCHIATRIC, PSYCHOLOGICAL AND CORRECTIONAL REPORTS IN PETITIONER'S CASE AND OTHER PENDING APPEALS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner will rely upon the discussion presented in his intial brief herein.

VII. PETITIONER WAS DENIED EQUAL PROTECTION AND DUE PROCESS BY THE RESOLUTION OF HIS CLAIM CONCERNING THE ARBITRARY APPLICATION OF THE DEATH PENALTY WITHOUT FIRST PROVIDING THE EXPERT ASSISTANCE NECESSARY FOR THE FULL AND FAIR CONSIDERATION OF THIS CLAIM.

In his opening brief, Mr. Adams argued that he had pled sufficient facts to require the provision of expert assistance in prosecuting his claim that the death penalty was (and is) being applied arbitrarily in Florida on the basis of geography, race, and other invalid factors. Two points of the state's response to this arguement merit a brief reply.

First, the state implies that the arbitrarness claim underlying the expert assitance issue has been forclosed as a matter of law by the Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976) and by this Court in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). This assertion, if intended, is not true. Proffitt, like Gregg in relation to Georgia, was concerned only with the facial validity of the Florida death penalty statute. Since the arbitrariness claim attacks the application of the statute, it is not foreclosed by Proffitt. See Zant v. Stephens, ___U.S.___, 102 S.Ct. 1856, 1857 (1982). Moreover, to the extent that Spinkellink can be read as foreclosing such an "as applied" attack, it "is no longer sound precedent."

Proffitt v. Wainwright, supra, 685 F.2d at 1262 n. 52. See also Smith v. Balkcom, 660 F.2d 573, 584-585 (5th Cir. 1981) (Unit B), modified, 671 F.2d 858 (5th Cir. 1982) (Unit B).

Second, the state argues that if Mr. Adams' allegations are insufficient to warrant an evidentiary hearing, they are insufficient to warrant the provision of expert assistance. The state's response confuses the standards for obtaining an evidentiary hearing with the standard for prevailing on the merits after such a hearing, and totally fails to consider the distinct issue of expert assistance in regard to such a hearing. Blackledge v. Allison, 431 U.S. 63 (1977) requires an evidentiary hearing unless there is no rationally conceivable state of facts to support the claim being advanced. Under this test, Mr. Adams was entitled to a hearing. However, he certainly could not be expected to prove his claim without expert assistance. Quite obviously, this Court cannot countenance a rule which would deprive an impecunious capital habeas corpus petitioner of the right to proceed meaningfully in a hearing to which he is entitled. Yet this is precisely what the state, in effect, has urged. The Eighth Amendment's requirement of reliability and the Fourteenth Amendment's requirement of equal protection forbid such a result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing has been furnished to Honorable Robert L.Bogen, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Buildng, West Palm Beach, Florida 33401, this 24th day of November, 1982.

_____
Of Counsel

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-5595

JAMES ADAMS,

Petitioner-Appellant,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court
For the Southern District of Florida

BRIEF FOR PETITIONER-APPELLANT

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decision arrived at was therefore neither fair nor reliable, since it was based on an inaccurate, one-sided sense of Mr. Adams because of counsel's failure to convey any of the "compassionate or mitigating factors stemming from the diverse frailties of mankind." Id. Obviously, a decision to impose death under these conditions is no different from one that is founded "in part upon misinformation of constitutional magnitude." Tucker v. United States, 404 U.S. 443, 447 (1972). Errors of this kind, which affect the essential character of the capital sentencing process can never be deemed harmless or nonprejudicial. See, e.g., Gardner v. Florida, 430 U.S. 319 (1977); Green v. Georgia, 442 U.S. 95 (1979). Mr. Adams' death sentence must, therefore, be vacated.

II. EXECUTION OF THE DEATH SENTENCE IMPOSED AGAINST MR. ADAMS IS GROSSLY DISPROPORTIONATE, EXCESSIVE, AND STANDARDLESS WHERE THE KILLING WAS NOT DELIBERATE BUT COMMITTED DURING A FELONY, AND WHERE AN AGGRAVATING CIRCUMSTANCE WAS APPLIED WHICH FAILS TO DIFFERENTIATE THIS CASE FROM ANY OTHER FELONY MURDER.

Mr. Adams was indicted for felony-murder, and the prosecutor frankly conceded throughout the proceedings that the only basis for return of a first degree murder verdict was the fact that the killing occurred during a felony (T 1050). Moreover, the evidence showed that the assailant was surprised during the course of a burglary by the deceased, whose death resulted from a violent struggle likely initiated by the latter. No weapons were brought into the house by the intruder, who used a fireplace poker belonging to the Browns to repel the deceased.

Mr. Adams was thus clearly convicted of the capital crime solely because of the jury's finding that the homicide occurred during the course of an enumerated felony. But as an aggravating factor justifying imposition of the death penalty, the trial court relied on the fact that the killing occurred during the course of a felony, the same factor on which conviction was predicated, and one which necessarily exists in every felony-murder case. Not only is the death sentence excessive when there has been no finding that the homicide was intentional, as in the present case, but this reliance on a factor which does not distinguish Mr. Adams' crime from any other felony murder strips Florida's death penalty statute of compliance with the requirement that capital sentencing be imposed only upon an individualized basis, as required by the Eighth Amendment of the United States Constitution.

In Gregg v. Georgia, 428 U.S. 153 (1976), the Supreme Court expressly recognized the cruel and unusual punishment prohibition may be violated where a punishment is disproportionate to the severity of the crime. Id. at 173. The Gregg holding expressly applied only to those cases where there was a deliberate taking of life.

> "[W]e are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."428 U.S. at 187 (emphasis supplied, footnote omitted.)

In Coker v. Georgia, 433 U.S. 584 (1977), the Court held that the Eighth Amendment proportionality analysis must be applied even to particular serious crimes which do not involve the deliberate taking of human life. Id. at 592. The death

penalty was found to be disproportionate for the violent felony of rape on the following test:

> "Under Gregg, a punishment is "excessive" and unconstitutional if it 1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or 2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." Id.

The logic of Coker plainly applies to invalidate any death sentence imposed for commission of a non-fatal felony. See, Eberheart v. Georgia, 433 U.S. 917 (1977) (per curiam), vacating two death sentences imposed upon conviction for non-fatal rape and kidnapping.

Culpability in the present case is the same as that in the violent felony of rape for which the death sentence was found excessive in Coker, unless there is a finding of intentional intent to take a human life. For here, although Mr. Adams may bear some degree of culpability for homicide, that culpability would not be sufficient to support a first degree murder conviction, let alone a death sentence, except for the fact that the killing occurred in the course of an enumerated felony. Yet it is now settled that the infliction of capital punishment on the basis of the crime alone, without assessing the offender's individual culpability for it, ignores considerations which are "a constitutionally indispensable part of the process of inflicting death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

This view was explicitly endorsed by Justice White in his concurring opinion in Lockett v. Ohio, 438 U.S. 586, 625-626 (1978):

> "The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated. Whatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders—and that debate rages on—its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful."
>
> * * *
>
> "Under those circumstances the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable or indeed, any perceptible goals of punishment."

The district court's reliance for a finding of deliberateness in the present case on the substitution of the felony for the element of intent normally required in a prosecution for first degree murder misses the mark. This is clarified by the Supreme Court's recent decision in Enmund v. Florida, __U.S.__, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which held that, even though the defendant participated in the underlying felony, so that his conviction for first degree murder was proper, the death sentence was disproportionate punishment in his case where he did not actually commit the killings and where he did not intend that they take place. Important to note is Justice White's assessment of the deterrent effect of the death sentence where a death arises as the result of the commission of a felony:

> "It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony. But competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself."

Id., 73 L.Ed.2d at 1153.

Enmund limited itself to actual consideration of the facts before it, where the defendant was a co-felon but not a "trigger-man." But it applied the same reasoning discussed, supra, which Mr. Adams contends mandates the conclusion that death is an appropriate sentence only where it is imposed after a finding that the killing being punished was intentional, a finding which cannot be made on the facts of the instant case.

Also arising from the fact that the instant prosecution was predicated solely upon a theory of felony murder was the use of the underlying felony as an aggravating circumstance. But this aggravation exists automatically in every felony murder case. Moreover, the Florida Supreme Court has interpreted the state statute in such a way that where even a single aggravating factor under the statute survives appeal, a death sentence will not be reversed in the absence of mitigating factors, despite the invalidity of some of the aggravation relied upon by a trial judge in imposing the ultimate penalty. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); see, Point IV. infra. Because every felony murder will always have at least one aggravating factor ipso facto, the effect is that death becomes the automatically preferred sentence in a felony murder case.

Certainly all felony murders do not, and constitutionally cannot, mandate the death sentence: a mandatory death sentence would be invalid. E.g., Woodson v. North Carolina, supra. But the application of the aggravating factor of an underlying felony which is implicit in the conviction for first degree felony murder oper-

ates in a similar manner to defeat the function of the statutory aggravating circumstances to confine and channel capital sentencing discretion, in violation of Furman v. Georgia, 408 U.S. 238 (1972). To uphold a death sentence on the basis that it was a felony murder provides no meaningful basis for distinguishing between those felony murderers who receive death and those who obtain life, rendering the Florida statute arbitrary and capricious as applied. Cf., Proffitt v. Florida, 428 U.S. 242, 252 (1976). The North Carolina Supreme Court so found in its decision striking the use of the underlying felony as an aggravating circumstance. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

Further, because every felony murder under the Florida scheme as presently applied comes into the penalty phase with at least one automatic aggravating factor, the burden of proof at that stage of the proceedings shifts to the defendant to establish mitigating evidence to outweigh the presumptive death sentence. Such a result can never be constitutionally permissible, cf., Mullaney v. Wilbur, 421 U.S. 684 (1975), particularly not in a case where the stakes are so high. See, Lockett v. Ohio, supra, 438 U.S. at n. 16 [plurality expressly reserves question as to the constitutionality of Ohio statute, reversed on other grounds, which required death unless defendant proved mitigation].

Finally, Eddings v. Oklahoma, __U.S.__, 102 S.Ct. 869, 71 L. Ed.2d 1 (1982) teaches that even mental factors which do not completely excuse criminal liability must be considered as relevant evidence on the issue of sentence in a capital case. Thus, even though the non-intentional nature of the killing in the instant

case is not a legally sufficient excuse which would result in the total avoidance of culpability for a capital felony because of the felony murder theory of prosecution—although it may well have been a complete defense had the State charged premeditated murder—it is a matter which is properly considered in mitigation of the sentence. But what provides the mitigation in the present case also provides an aggravation: the underlying felony, as a matter of law. Once again, the sentencer is left without substantial guidance on the punishment issue, leading to that standardless and arbitrary sentencing process condemned in Furman v. Georgia, supra.

III. THE AGGRAVATING CIRCUMSTANCES CONSIDERED BY THE JURY AND THE TRIAL JUDGE FAILED TO CHANNEL THEIR SENTENCING DISCRETION AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENT.

Mr. Adams contends that three of the aggravating circumstances considered by the jury and the trial judge in his case were considered in violation of Eighth and Fourteenth Amendment safeguards. One of the circumstances—that the homicide was "especially heinous, atrocious, or cruel" [Fla.Stat. §921.141(5)(h)]—was improperly considered because it was not supported by the evidence consistently held as necessary to support it. Two other circumstances—that Mr. Adams had a criminal record of "at least five" convictions and that the victim has been a prominent outstanding citizen—were improperly considered because they were non-statutory aggravating circumstances precluded from consideration by the Florida death penalty statute. Because the consideration of these aggravating circumstances in the sentencing